Supreme Court, U.S.
FILED
JUN 7 1994
OFFICE OF THE CLERK

No. 93-1723

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LARRY D. JOHNSTON, LAWRENCE G. LYON and H. RODGERS COMPANY,

Petitioners,

v.

CIGNA CORPORATION, CIGNA INDIVIDUAL FINANCIAL SERVICES COMPANY, CIGNA SECURITIES, INC., CIGNA FINANCIAL PARTNERS, INC., CIGNA HOLDINGS, INC., and M. DOAK JACOWAY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether application of § 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1(b), to overturn final, unappealed judgments of Article III courts and reopen closed cases violates the constitutional separation of powers and "vested rights" doctrines.

LIST OF PARTIES

All parties below are listed in the caption. Pursuant to Rule 29.1 of the Rules of this Court, respondents provide the following list of parent corporations and non-wholly owned subsidiaries: CIGNA Compania de Seguros de Vida (Chile) S.A., CIGNA Corp., CIGNA Financial Advisors, Inc., CIGNA Holdings, Inc., CIGNA Hospital of Los Angeles, Inc., Connecticut General Corp., North Coast Investment Corp., P.T. Asuransi CIGNA Indonesia, Riyad Insurance Co. Ltd.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Cigna Corporation, Cigna Individual Financial Services Company, Cigna Securities, Inc., Cigna Financial Partners, Inc., Cigna Holdings, Inc., and M. Doak Jacoway respectfully submit this brief in opposition to the petition for writ of certiorari in this case.

STATEMENT OF THE CASE

Petitioners, plaintiffs below, brought suit against respondents on January 30, 1990, alleging claims of alleged violations of § 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, and pendent state law claims. These claims allegedly arose from petitioners' purchase of real estate limited partnerships.

On February 20, 1990, respondents moved to dismiss petitioners' § 10(b) claims as time-barred and for failure to state a claim, and requested that the district court decline to exercise jurisdiction over the pendent state law claims. On January 9, 1991, the district court denied the motion with respect to respondents' § 10(b) claims but declined to exercise jurisdiction over the state law claims and accordingly dismissed those claims.

On June 20, 1991, this Court held that the § 10(b) implied private right of action is subject to the same "1-and-3-year" statute of limitations that governs comparable express private rights of action created by the 73rd Congress at the time the 1934 Act was enacted. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991). The Court also issued its opinion in *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529 (1991), on the same day *Lampf* was decided. *Beam* held that a rule of law articulated by the Court and applied to the parties before the Court would be equally applicable in all pending cases raising the same issue. Under *Beam*, therefore, this Court's construction of § 10(b) in *Lampf* governed all pending cases as well, including the case at bar.

On September 6, 1991, respondents moved for summary judgment, arguing that petitioners' only remaining claims—those asserted under § 10(b)—were untimely under the *Lampf* 1-and-3-year rule. On October 10, 1991, the district court, applying *Lampf*, granted summary judgment, and entered a final judgment in respondents' favor. Petitioners did not file a notice of appeal, nor did they file post-trial motions to alter, amend or modify the judgment.

On December 19, 1991, more than two months after the district court's entry of a final judgment in this case, and more than a month after petitioners' time for filing a notice of appeal had expired, the President signed into law § 27A of the 1934 Act, 15 U.S.C. § 78aa-1.[1] Section 27A(b) provides:

> (b) **Effect on dismissed causes of action.** Any private civil action implied under section 10(b) of this Act . . . that was commenced on or before June 19, 1991—
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section . . . .

[1] Section 27A, a non-germane rider, was enacted as Section 476 of the FDIC Improvement Act of 1991, Pub. L. No. 102-402, 105 Stat. 2236, 2387 (1991).

On January 13, 1992, petitioners filed a motion in the district court pursuant to § 27A seeking to reopen the case and reinstate their § 10(b) claims. Two months later, on March 10, 1992, while the motion for reinstatement was still pending, petitioners moved pursuant to Fed. R. Civ. P. 60(b) for relief from the October 10, 1991 judgment. In that motion, petitioners contended that Rule 60(b) provided a means by which the district court could circumvent the constitutional limitation that the vested rights doctrine imposed on the application of legislation such as § 27A to a final, unappealed judgment. Petitioners conceded that if the district court rejected their arguments under Rule 60(b) the vested rights doctrine would preclude, as a constitutional matter, application of § 27A to reopen the judgment in this case.

On March 20, 1992, the district court denied petitioners' motion to reinstate, concluding that § 27A "impermissibly upsets a final judgment of this court." Pet. App. C-2, 789 F. Supp. at 1099. The district court observed that "[t]he Supreme Court has repeatedly held that litigants have vested rights in final judgments" and that "Congress has no power to take away those vested rights through later legislation." *Id.* at C-3, 789 F. Supp. at 1100. The court concluded that "because [§ 27A] calls for the reinstatement of claims finally adjudicated, it is unconstitutional as applied here." *Id.* The court also denied petitioners' Rule 60(b) motion. *Id.* at C-4, 789 F. Supp. at 1099.

On December 7, 1993, the Tenth Circuit affirmed. The court held "that section 27A(b) as it applies to the final nonappealable judgment in this case is unconstitutional as violative of the vested rights doctrine and the principle of separation of powers," and "that

the district court did not abuse its discretion in denying plaintiffs Rule 60(b)(6) relief." Pet. App. A-24, 14 F.3d at 497. The Tenth Circuit based its vested rights holding primarily on this Court's decision in *McCullough* v. *Virginia*, 172 U.S. 102 (1898), which held that "[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment." *Id.* at 123-24; *see* Pet. App. A-9 to A-13, 14 F.3d at 498. The court also agreed with respondents that, by enacting § 27A(b), "Congress unconstitutionally usurps the role of the judiciary by upsetting final judgments," *id.* at A-16, 14 F.3d at 494, in violation of the separation-of-powers principles set forth in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). Pet. App. A-17, 14 F.3d at 494-95. Petitioners' petition for rehearing and suggestion for rehearing in banc was denied by the Tenth Circuit on February 1, 1994.

REASONS FOR DENYING THE WRIT

Petitioners seek review of the Tenth Circuit's decision that application of § 27A(b) to reopen closed cases and to set aside final, unappealed judgments of Article III courts violates the constitutional separation of powers and vested rights doctrines. This case thus raises the same question as that presented by the petitions for certiorari in *Morgan Stanley & Co.* v. *Pacific Mutual Life Insurance Co.*, No. 93-609 (U.S. May 23, 1994), *aff'g by equally divided vote*, *Pacific Mutual Life Ins. Co.* v. *First RepublicBank Corp.*, 997 F.2d 39 (5th Cir. 1993), and *Plaut* v. *Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3503 (U.S. Jan. 11, 1994) (No. 93-1121).

To respondents' knowledge, *Morgan Stanley*, *Plaut* and the case at bar are the only three cases currently pending in the federal courts in which the constitutionality of § 27A(b), as applied to final unappealed judgments, is at issue. This issue will not arise in any other case because the 60-day period for seeking reinstatement of § 10(b) claims pursuant to § 27A has long since passed. Therefore, the question presented by the petition—although of significant constitutional dimension—will directly affect the outcome of only three cases.

In two of the three cases—*Plaut* and the case at bar—the courts of appeals held that § 27A(b) violates the Constitution's limits on congressional power and impermissibly intrudes on core functions of the Judicial Branch. As the court below concluded, its decision here and the Sixth Circuit's decision in *Plaut* are fully consistent with this Court's decisions in cases such as *McCullough* and *Hayburn's Case*, and the views of other Circuits regarding Congress' lack of constitutional authority to strike down final unappealed judgments. *See* Pet. App. A-10 to A-24, 14 F.3d at 491-97.

By contrast, the Fifth Circuit, which issued its decision in *Morgan Stanley* prior to the decisions in *Plaut* and this case striking down the statute, is the only court of appeals to uphold § 27A(b) as applied to such judgments. Indeed, *Morgan Stanley* is an isolated anomaly because, other than that decision, there is not "a single case where a court has upheld an attempt by Congress to upset a final, unappealable judgment in a case between private parties." Pet. App. A-19 to A-20, 14 F.3d at 495.

The Court should deny certiorari in this case. In doing so, the Court will avoid having to address a constitutional challenge to a statute that will not arise in any other cases, while also leaving in place the correct judgment of the court below that § 27A(b) is unconstitutional as applied in the context of this case. In the event that Congress in the future takes the extraordinary step of enacting another statute that purports to overturn final judgments of Article III courts, this Court can address the constitutionality of such action at that point, after the lower courts have had a further chance to address and explore this question in the first instance.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

June 1, 1994

Respectfully submitted,

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